STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2010
v	No. 289088 Genesee Circuit Court
JOHN MICHAEL CADARETTE, Defendant-Appellant.	LC No. 03-013153-FC

Before: JANSEN, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of first-degree home invasion, MCL 750.110a(2), two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, possession of a firearm by a felon (felon-in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 160 to 300 months for the home invasion conviction, 450 to 800 months for each CSC I conviction, 450 to 800 months for the armed robbery conviction, 450 to 800 months for the conspiracy-to-commit-armed-robbery conviction, and 18 to 60 months for the felon-in-possession conviction. He was also sentenced to a mandatory term of two years in prison for the felony-firearm conviction. We affirm defendant's convictions, but remand for correction of defendant's Judgment of Sentence consistent with this opinion.

Defendant first argues that there was insufficient evidence to support his convictions of two counts of CSC I. We disagree.

There are several different forms of CSC I defined in MCL 750.520b(1). Defendant was charged with CSC I under MCL 750.520b(1)(e), which has the following elements: (1) sexual penetration of the victim by the defendant, (2) while the defendant is armed with a weapon. See *People v Smith*, 128 Mich App 361, 365-366; 340 NW2d 855 (1983). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r); *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

MCL 767.39 states:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

The elements of aiding and abetting are: (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). An aiding and abetting instruction is proper where there is evidence that "(1) more than one person was involved in the commission of the crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). However, a person's mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider and abettor. *People v Turner*, 125 Mich App 8, 11; 336 NW2d 217 (1983).

Viewing the evidence of this case in a light most favorable to the prosecution, we find that there was sufficient evidence from which a rational trier of fact could have concluded beyond a reasonable doubt that defendant was guilty—albeit partially as an aider and abettor, MCL 767.39—of both orally and vaginally penetrating the victim. The first time the victim was taken to the back of the property, defendant held a loaded gun while his brother, Jeffrey Cadarette, placed his penis into the victim's mouth and vagina. The victim's hand was placed over the gun so she knew that defendant would kill her if Jeffrey told him to do so. The victim was then taken back into the house. Within the hour, both men again led the victim to the back of the property. This time, defendant placed his penis into the victim's mouth. Defendant also attempted to place his penis into the victim's vagina; however, he was only able to touch the victim's vagina with his penis because Jeffrey told defendant it was time to go. Based on the evidence, a reasonable jury could have concluded that defendant aided and abetted Jeffrey in the oral and vaginal penetration of the victim. Moreover, a reasonable jury could also have concluded that defendant, himself, orally penetrated the victim. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The prosecution offered sufficient evidence from which a rational trier of fact could have concluded beyond a reasonable doubt that defendant was guilty of two counts of CSC I under MCL 750.520b(1)(e).

Defendant next argues that the trial court judge should have been disqualified from this case. We disagree.

Because defendant did not seek review by the chief judge of the denial of his motion to disqualify Judge Hayman, this issue is not preserved for appellate review. MCR 2.003(C)(3); *In re Contempt of Steingold*, 244 Mich App 153, 160; 624 NW2d 504 (2000). Unpreserved errors are reviewed for plain error affecting the defendant's substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). To warrant reversal, the error must have been prejudicial, meaning that it must have affected the outcome of the proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). The defendant bears the burden of showing prejudice. *Id*.

A judge must be disqualified if he or she cannot impartially hear a case, including: (1) when he or she is personally biased or prejudiced for or against a party or attorney, (2) when he or she has personal knowledge of disputed facts, (3) when he or she has been involved in the case as a lawyer, (4) when he or she was a partner of a party or lawyer within the preceding two years, (5) when he or she or a relative has an economic interest in the proceeding or a party to the proceeding, (6) when he or she or a relative is a party or an officer, director, or trustee of a party, (7) when he or she or a relative is acting as counsel in the proceeding, or (8) when he or she or a relative is likely to be a material witness in the proceeding. MCR 2.003(B); *People v Wade*, 283 Mich App 462, 469-470; 771 NW2d 447, rev'd on other grounds ___ Mich ___ (2009).

A trial judge is presumed to be impartial, and the party asserting bias or partiality has a heavy burden of overcoming this presumption. *Id.* at 470. Generally, a showing of actual prejudice is required to disqualify a judge under MCR 2.003. *Id*. However, we have recognized that "'"there may be situations in which the appearance of impropriety on the part of the judge . . . is so strong as to rise to the level of a due process violation."'" *Id*. (citations omitted). Consequently, a showing of actual bias is not needed when the trial court judge (1) has a pecuniary interest in the outcome of the case, (2) has been the target of personal abuse or criticism, (3) is enmeshed in other matters involving the petitioner, or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact-finder or initial decision maker. *Id*.

But the fact that a trial court's ruling is reversed, or that the judge stated that the effect of the reversal would be difficult to accept, does not require automatic disqualification on remand. *People v Page*, 83 Mich App 412, 419-420; 268 NW2d 666 (1978). Further, a judge is not to be disqualified simply because he or she has made prior rulings adverse to the defendant. *People v Elmore*, 92 Mich App 678, 681; 285 NW2d 417 (1979). The proper standard in such cases remains one of "actual bias or prejudice." *Id*.

In this case, defendant has not overcome the presumption that the trial court judge was impartial. Defendant argued in his motion to disqualify that Judge Hayman manifested a bias against him that would have a negative affect on future proceedings. However, Judge Hayman directly responded to defendant's concerns on the record. Judge Hayman stated that he could impartially hear the case, that he was not biased against defendant or his attorney, and that defendant would receive a fair trial in his court. Judge Hayman further clarified that his previous comments concerning the Michigan Supreme Court order allowing defendant to withdraw his plea[1] "[had] nothing to do with Mr. Cadarette." Indeed, it appears to us after reviewing the record that Judge Hayman's comments in this regard were not directed toward defendant, but rather toward the Supreme Court's order. Although Judge Hayman's initial acceptance of defendant's plea was reversed, Judge Hayman specifically stated that he held no prejudice or

[1] On March 10, 2008, during the proceeding to allow defendant to withdraw his plea, Judge Hayman stated, "[a]nd how did [the Michigan Supreme Court] find that there was an in chamber discussion if I disagreed that there ever was . . . [t]hat's what I would like to know. How did they find that? [W]hat did they use as the basis to find that there was an in chambers discussion? It's kinda odd because nobody's asked me."

bias toward defendant and that defendant would receive a fair and impartial trial. Defendant simply has not demonstrated the existence of prejudice, actual bias, or any other factor that would lead us to doubt the veracity of Judge Hayman's statements in this regard. In sum, we perceive no outcome-determinative plain error resulting from Judge Hayman's denial of defendant's motion to disqualify.

Defendant lastly contends that it was improper for the trial court to order that his conspiracy-to-commit-armed-robbery sentence run consecutively to his felony-firearm sentence. We agree.

"Whether the trial court properly imposed consecutive sentences is a question of law, which we review de novo." *People v Wyrick*, 265 Mich App 483, 486; 695 NW2d 555 (2005), vacated in part on other grounds 474 Mich 947 (2005).

MCL 750.227b(2) states:

> A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

A felony-firearm sentence may run consecutively only to the sentence imposed for the specific underlying felony. *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). "No language in the statute permits consecutive sentencing with convictions other than the predicate offense." *Id*. at 464.

In this case, the Judgment of Sentence states that "counts 1 through 6 are concurrent to each other, but consecutive with count 7." The Judgment of Sentence lists conspiracy to commit armed robbery as count five and felony-firearm as count seven. However, the prosecution only listed CSC I, armed robbery, first-degree home invasion, and felon-in-possession as the underlying predicate felonies for the felony-firearm count. Because conspiracy to commit armed robbery was not listed as one of the predicate offenses, defendant's sentence for conspiracy to commit armed robbery may not run consecutively to the felony-firearm sentence. *Id*. at 459. Therefore, we remand for correction of the Judgment of Sentence to provide that defendant's conspiracy-to-commit-armed-robbery sentence and felony-firearm sentence are to be served concurrently.

Affirmed, but remanded for correction of defendant's Judgment of Sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly